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PETER CHANG NYUK MING v. TIMBALAN MENTERI DALAM NEGERI & ORS

FEDERAL COURT, PUTRAJAYA
MARY LIM FCJ
HARMINDAR SINGH DHALIWAL FCJ
B RHODZARIAH BUJANG FCJ
[CRIMINAL APPEAL NO: 05(HC)-2-01-2023(S)]
10 JULY 2023

C **Abstract** – *There are three types of orders that may be issued under the Dangerous Drugs (Special Preventive Measures) Act 1985, ie, restriction order, detention order and suspension of detention order. An issuance of a suspension order is likened to a stay of an order of the court; by no means or any stretch of the imagination, could it ever be suggested that the suspension order, albeit with restrictions, would render the detention* D *order revoked. A suspension order merely suspends the operation of the detention order. In the circumstances, an applicant who is issued with a suspension order with restrictions is entitled to apply for a writ of habeas corpus.*

E ***CRIMINAL PROCEDURE:*** *Habeas corpus – Application for – Detention order for offence under s. 2 of Dangerous Drugs Act 1952 – Subsequent suspension of detention order with restrictions – Whether proper mode was by way of judicial review – Whether applicant still serving under detention order – Whether placement of restrictions disentitled appellant to writ of habeas corpus – Whether imposition* F *of restrictions and conditions meant that restriction order was in place of detention order – Criminal Procedure Code, s. 365 – Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(3) & 7(1) – Federal Constitution, art. 5(2)*

G ***CRIMINAL PROCEDURE:*** *Habeas corpus – Preventive detention – Detention order – Absence of specifications of presence of substantial body of persons in detention order or grounds of detention – Whether rendered detention invalid – Federal Constitution, art. 149*

The appellant, pursuant to a detention order, was detained at Pusat Pemulihan Akhlak, Simpang Renggam, Johor for a period of two years for H an alleged involvement in activities related to the trafficking of dangerous drugs as defined under s. 2 of the Dangerous Drugs Act 1952 ('DDA'). The first respondent subsequently issued a suspension of the detention order leading the appellant to be 'detained for a period of two years at Mukim Chin-Chin Daerah Jasin, Melaka' on a list of eight restrictions or conditions concerning his movement and the need to report to the local police every I Monday of the week. The appellant moved the court for a writ of *habeas corpus* on the grounds, *inter alia*, that (i) his detention was invalid, null and void; (ii) there was a breach of the provisions of the Federal Constitution

('FC') and/or the Dangerous Drugs (Special Preventive Measures) Act 1985 ('1985 Act'); and (iii) the grounds for his detention were capricious, vague and without substance. On the hearing of the application, a preliminary objection of a wrong mode was raised; that because the appellant was now restricted under a restriction order, the proper mode should have been an application for a judicial review seeking declaratory orders or such similar orders and not through a criminal application for an order of *habeas corpus* under s. 365 of the Criminal Procedure Code ('CPC'). The High Court Judge ('HCJ') found that, since the appellant was no longer under imprisonment, neither was he physically detained in any detention centre, but was, in fact, allowed to move about freely within the district of Jasin, there was no detention of such a nature as to attract the application of a writ of *habeas corpus* and did not fall within the ambit of s. 365 of the CPC. The appellant's application was dismissed by the HCJ. Hence, this appeal.

Held (ordering issuance of writ of *habeas corpus*)
Per Mary Lim FCJ delivering the judgment of the court:

(1) After a detention order has been issued, the first respondent may, under s. 7(1) of the 1985 Act, suspend the operation of that order, subject to the imposition of all or any of the restrictions in s. 6(3)(a) to (j). At the time of filing of the application for the writ of *habeas corpus*, an order suspending the operation of the detention order had already been issued ('suspension order'). Although the place of detention has changed, the appellant was no less serving under a detention order. It was only the operation of the detention order that has been suspended, not the detention order itself; the detention order remained in place and was never revoked. (paras 8 & 10)

(2) The placement of the appellant with restrictions imposed under s. 7(1) or, even if there was a restriction order issued under s. 6(3) in the first place, instead of a detention order, did not disentitle the appellant to a writ of *habeas corpus*. This remedy remained available at all times. The suspension order merely suspended the operation of the detention order. The imposition of any or all the restrictions and conditions in s. 6(3)(a) to (j) did not mean that there was a restriction order in place of the detention order. The appellant was always detained under a detention order, and not a restriction order. The HCJ erred in holding that the writ of *habeas corpus* was not available to the appellant. (paras 13-15)

(3) The power to issue a writ of *habeas corpus* is part of the additional powers of the High Court, as provided in s. 25(2) of the Courts of Judicature Act 1964, for the enforcement of rights in Part II of the FC, especially rights enshrined in art. 5(2). The exercise of the additional powers must be in accordance with any written law or rules of court relating to the same, in this case, the CPC, that purpose and intent for the existence of the additional powers must always weigh in the mind of any adjudicating

A body. Article 5(2) of the FC must be 'given full and substantive effect' and the remedy remains available, even if the detainee has since been discharged. A full and proper construction of art. 5(2) requires the whole or entire series of transactions, detentions or orders to be scrutinised. In the present case, the suspension order could not stand discrete from the
B detention order; it was dependent on the detention order. (paras 17, 20 & 23)

(4) There were no specifications of the presence of a substantial body of persons, be it in the detention order or the grounds of detention, as required under the terms of art. 149 of the FC under which the 1985 Act
C was enacted. The stark absence of this requisite rendered the detention of the appellant invalid. As the detention order suffered from the serious deficit which rendered the detention unlawful, null and void, it would serve no useful purpose to remit the case for hearing on the merits. In order to do substantial justice, a writ of *habeas corpus* was ordered to be
D issued forthwith. (paras 28, 29 & 31)

Bahasa Melayu *Headnotes*

Perayu, berikutan satu perintah penahanan, ditahan di Pusat Pemulihan Akhlak, Simpang Renggam, Johor selama dua tahun atas penglibatan dalam
E aktiviti-aktiviti berkaitan pengedaran dadah berbahaya seperti ditakrif bawah s. 2 Akta Dadah Berbahaya 1952 ('ADB'). Responden pertama kemudian mengeluarkan penangguhan perintah penahanan tersebut yang menjurus pada perayu 'ditahan untuk tempoh dua tahun di Mukim Chin-Chin Daerah Jasin, Melaka', berdasarkan lapan sekatan atau syarat-syarat berkaitan
F pergerakannya dan keperluan untuk melapor diri dengan pihak polis tempatan setiap Isnin. Perayu memohon pada mahkamah untuk writ *habeas corpus* atas alasan-alasan, antara lain, bahawa (i) penahanannya tidak sah dan batal; (ii) terdapat pelanggaran peruntukan-peruntukan Perlembagaan Persekutuan ('Perlembagaan') dan/atau Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta 1985'); dan (iii) alasan penahanannya
G arbitrari, kabur dan tidak kukuh. Semasa perbicaraan permohonan tersebut, bantahan awalan berkaitan cara permohonan yang sepatutnya dibangkitkan; bahawa oleh sebab perayu kini disekat oleh perintah sekatan, cara permohonan yang sewajarnya adalah permohonan semakan kehakiman untuk perintah deklarasi atau perintah serupa dan bukan melalui permohonan
H jenayah untuk perintah *habeas corpus* bawah s. 365 Kanun Tatacara Jenayah ('KTJ'). Hakim Mahkamah Tinggi ('HMT') mendapati, oleh sebab perayu tidak lagi dalam pemenjaraan, dan juga tidak ditahan secara fizikal di mana-mana pusat tahanan, sebaliknya, dibenarkan bergerak dengan bebas dalam daerah Jasin, tiada penahanan yang memerlukan permohonan writ *habeas*
I *corpus* dan tidak terangkum dalam s. 365 KTJ. Permohonan perayu ditolak HMT. Oleh itu, rayuan ini.

Diputuskan (memerintahkan pengeluaran writ *habeas corpus*)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

(1) Selepas perintah penahanan dikeluarkan, responden pertama boleh, bawah s. 7(1) Akta 1985, menangguhkan perjalanan perintah tersebut, tertakluk pada pengenaan kesemua atau apa-apa sekatan bawah s. 6(3)(a) hingga (j). Pada masa pemfailan permohonan writ *habeas corpus*, satu perintah penangguhan perjalanan perintah penahanan tersebut telah pun dikeluarkan ('perintah penangguhan'). Walaupun tempat penahanan berubah, perayu kekal menjalani perintah penahanan tersebut. Hanya perjalanan perintah penahanan ditangguh, bukan perintah penahanan itu sendiri; perintah penahanan kekal berjalan dan tidak pernah dibatalkan.

(2) Penempatan perayu dengan sekatan yang dikenakan bawah s. 7(1) atau, jika ada perintah sekatan dikeluarkan bawah s. 6(3) dan bukan perintah penahanan, tidak menjadikan perayu tidak berhak mendapat writ *habeas corpus*. Remedi ini kekal sedia ada pada setiap masa. Perintah penangguhan hanya menangguhkan perjalanan perintah penahanan. Pengenaan apa-apa atau kesemua sekatan dan syarat-syarat dalam s. 6(3)(a) hingga (j) tidak bermaksud bahawa ada perintah sekatan yang menggantikan perintah penahanan. Perayu sentiasa ditahan bawah perintah penahanan, dan bukan perintah sekatan. Hakim Mahkamah Tinggi khilaf apabila menolak writ *habeas corpus* untuk perayu.

(3) Kuasa mengeluarkan writ *habeas corpus* adalah sebahagian kuasa tambahan Mahkamah Tinggi, seperti yang diperuntukkan bawah s. 25(2) Akta Mahkamah Kehakiman 1964, untuk penguatkuasaan hak-hak dalam Bahagian II Perlembagaan, khususnya hak yang termaktub dalam per. 5(2). Pelaksanaan kuasa tambahan tersebut perlu dibuat berikutan apa-apa undang-undang bertulis atau perintah mahkamah berkaitan perkara tersebut, dalam kes ini, KTJ, bahawa tujuan dan niat kewujudan kuasa tambahan perlu sentiasa diimbangi oleh mana-mana badan penghakiman. Perkara 5(2) Perlembagaan perlu 'diberi kesan penuh dan substantif' dan remedi tersebut kekal ada, walaupun orang yang ditahan telah dilepaskan. Pentafsiran penuh dan wajar per. 5(2) memerlukan kesemua atau keseluruhan siri transaksi, penahanan atau perintah diteliti. Dalam kes ini, perintah penangguhan tidak boleh berdiri secara berasingan daripada perintah penahanan; perintah penangguhan bersandar pada perintah penahanan.

(4) Tiada spesifikasi tentang kewujudan kumpulan besar orang, sama ada dalam perintah penahanan atau alasan-alasan penahanan, seperti yang diperlukan bawah terma-terma per. 149 Perlembagaan yang di bawahnya Akta 1985 digubal. Ketiadaan jelas keperluan ini menjadikan penahanan perayu tidak sah. Oleh sebab perintah penahanan mengalami

A defisit serius yang menjadikan penahanan tersebut tidak sah dan batal, tiada keperluan untuk mengembalikan kes tersebut untuk perbicaraan atas merit. Writ *habeas corpus* diperintahkan untuk dikeluarkan agar keadilan terjamin.

B **Case(s) referred to:**
Asmira Misman v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2022] 1 LNS 2359 HC ***(refd)***
Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors [1985] 1 CLJ 229; [1985] CLJ (Rep) 59 SC ***(not foll)***
Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***
C *Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC* ***(refd)***
Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***
Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Sejahratul Dursina v. Kerajaan Malaysia & Ors [2006] 1 CLJ 593 FC ***(not foll)***
D *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 2 CLJ 29 FC* ***(refd)***
Sureshwaran V Rajoo lwn. Ketua Polis Negara & Yang Lain [2015] 1 LNS 895 CA ***(not foll)***
Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC ***(refd)***

E **Legislation referred to:**
Courts of Judicature Act 1964, s. 25(2), Schedule, para 1
Criminal Procedure Code, s. 365
Dangerous Drugs Act 1952, s. 2
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), (3)(a), (b),
F (c), (d), (e), (f), (g), (h), (i), (j), 7(1), (3)
Federal Constitution, arts. 5(2), 149

For the appellant - K Rakhbir Singh; M/s Rakhbir Singh & Co
For the respondent - Zulkipli Abdullah & Nuur Izham Ismail; SFCs

[Editor's note: For the High Court judgment, please see Peter Chang Nyuk Ming
G *v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2022] 1 LNS 3284 (overruled).]*

Reported by S Barathi

JUDGMENT

H **Mary Lim FCJ:**

[1] The appellant filed for the issue of a writ of *habeas corpus*. The application was dismissed by the learned judge who agreed with the preliminary objection raised by the learned Senior Federal Counsel (SFC); that such writ does not lie where the *corpus* is not or is no longer in physical
I detention. We disagree and these are our reasons.

Some Material Facts

[2] Pursuant to a detention order dated 30 August 2021 issued under the hand of the first respondent, the appellant was detained at Pusat Pemulihan Akhlak, Simpang Renggam, Johor for a period of two years. He is alleged to have been involved in activities related to the trafficking of dangerous drugs as defined under s. 2 of the Dangerous Drugs Act 1952 (Act 234). Those activities were said to have threatened public order in which case action against him had to be taken under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316).

[3] On 21 January 2022, the first respondent issued a suspension of the detention order leading the appellant to be "detained for a period of two years at Mukim Chin-Chin Daerah Jasin, Melaka" on a list of eight restrictions or conditions concerning his movement and the need to report to the local police every Monday of the week. Although it is not clear if the appellant was in fact affixed with an electronic monitoring device or EMD, one of those conditions did specify that he was liable to be so affixed.

[4] The appellant moved the court for a writ of *habeas corpus* on the grounds, *inter alia*, that his detention was invalid, null and void; that there was a breach of the provisions of the Federal Constitution and/or the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316); that the grounds for his detention were capricious, vague and without substance.

[5] On the hearing of the application, the learned SFC raised the preliminary objection of a wrong mode; that because the appellant was now restricted under a restriction order, the proper mode should have been an application for a judicial review seeking declaratory orders or such similar orders and not through a criminal application for an order of *habeas corpus* under s. 365 of the Criminal Procedure Code (CPC). The decisions in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81; *Sejahratul Dursina v. Kerajaan Malaysia & Ors* [2006] 1 CLJ 593; *Sureshwaran V Rajoo lwn. Ketua Polis Negara & Yang Lain* [2015] 1 LNS 895, were cited in support.

Decision Of The High Court

[6] The learned judge agreed; finding that since the appellant was no longer under imprisonment; neither was he physically detained in any detention centre, that he was in fact allowed to move about freely within the district of Jasin, there was no detention of "such a nature as to attract the application of a writ of *habeas corpus* and does not fall within the ambit of s. 365 CPC". The writ of *habeas corpus* was thus not available to the appellant.

Our Decision

[7] Under Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316), three types of orders may be issued, namely restriction order, detention order, and suspension of detention order:

Power to order detention and restriction of persons

6(1) Whenever the Minister, after considering:

(a) the complete report of investigation submitted under subsection 3(3); and

(b) the report of the Inquiry Officer submitted under subsection 5(4), is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

(2) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a "place of detention") as the Minister may direct and in accordance with any instructions issued by the Minister and any regulations made under section 22.

(3) If the Minister is satisfied that for the purpose mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a "restriction order") imposing upon that person (hereinafter referred to as a "restricted person") all or any of the following restrictions and conditions:

(a) that he shall be subject to the supervision of the police for any period not exceeding two years;

(b) that he shall reside within the limits of any State or any Federal Territory or any area thereof specified in the restriction order;

(c) that he shall not transfer his residence to any other area without the written authority of the Chief Police Officer of the State or Federal Territory concerned;

(d) that except in so far as may be otherwise provided by the restriction order, he shall not leave the area within which he resides without the written authority of the Chief Police Officer of the State or Federal Territory concerned;

(e) that he shall at all times keep the Officer in Charge of the Police District in which he resides notified of the house or place in which he resides;

(f) that he shall at such time or times as may be specified in the restriction order present himself at the nearest police station;

(g) that he shall remain within doors, or within such area as may be defined in the restriction order, between such hours as may be specified in the restriction order, unless he obtains special permission to the contrary from the Officer in Charge of the Police District;

(h) that except in so far as may be otherwise provided by the restriction order, he shall not enter any area specified in the restriction order;

(i) that he shall keep the peace and be of good behaviour;

(j) that he shall enter into a bond, with or without sureties as the Minister may direct and in such amount as may be specified in the restriction order, for his due compliance with the restrictions and conditions imposed on him by the restriction order.

(4) …

(5) …

(6) …

(7) …

Suspension of detention orders

7(1) The Minister may, at any time, direct that the **operation of any detention order be suspended** subject to all or any of the restrictions and conditions which he is empowered by subsection 6(3) to impose by a restriction order, and subject, if the Minister so directs, to the requirement that the person against whom the detention order was made shall enter into a bond as provided in subsection 6(4).

(2) Where a detention order is suspended as aforesaid, subsection 6(6) shall have effect as if the restrictions and conditions on which the detention order is suspended were restrictions and conditions imposed by a restriction order.

(3) The Minister may revoke the suspension of any detention order if he is satisfied that the person against whom the detention order was made has failed to observe any restriction or condition imposed upon him or that it is necessary in the interest of public order that the suspension should be revoked, and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable be returned to his former place of detention or, if the Minister so directs, sent to another place of detention.

(4) The suspension of any detention order as aforesaid shall, subject to subsection 6(6) as applied by subsection (2) and subject also to subsection (3), continue in force for the unexpired portion of the period of the detention order specified under subsection 6(1) or under subsection 11A(1). (emphasis added)

Suspension Of The Detention Order

[8] It is not in dispute that at the time of filing of the application for a writ of *habeas corpus,* an order suspending the operation of the detention order had already been issued (suspension order). Pursuant to this order, the appellant was then moved from Pusat Pemulihan Akhlak, Simpang Renggam, Johor to the mukim or township of Chin-Chin in the district of Jasin, Melaka.

A **[9]** The significance of the suspension order cannot be overstated. While a detention order is issued under s. 6(1), a suspension order is issued under s. 7. Instead of issuing a detention order, the first respondent may in fact, issue a restriction order under s. 6(3). Such a restriction order is issued where the first respondent is satisfied that it is unnecessary to detain the appellant, B yet it is necessary that control and supervision should be exercised over him or that restrictions and conditions should be imposed in respect of his activities, freedom of movement or places of residence or employment. The restrictions or conditions that may be imposed are those as set out in s. 6(3)(a) to (j).

C **[10]** After a detention order has been issued, first respondent may, under s. 7(1), suspend the operation of that order subject to the imposition of all or any of the restrictions found in s. 6(3)(a) to (j). And, this is precisely what happened here. The operation of the detention order was suspended and a list of restrictions were imposed. Although the place of detention has changed, D the appellant is no less serving under a detention order. It is only the operation of the detention order that has been suspended, not the detention order itself. That detention order remains in place and was never revoked.

[11] Section 7(3) further states that in the event the restrictions or conditions imposed under s. 7(1) are breached, the first respondent may E revoke the suspension order, and have the appellant rearrested without warrant. Where that happens, the appellant is either returned to Pusat Pemulihan Akhlak, Simpang Renggam, Johor or to any other place of detention as directed by the first respondent.

[12] Consequently, for all intents and purposes, the detention order F subsists. The suspension of its operation and placing the appellant in the mukim of Chin-Chin with restrictions imposed does not alter the fact that the detention order that was first issued against the appellant is still very much "alive". For easier comprehension, the circumstance of a suspension of a detention order may be likened to a stay of an order of court. By no means G or any stretch of the imagination can it ever be suggested that the stay of the execution of an order of court means that the order no longer exists, nor is it any less valid.

[13] Further, the suspension order merely suspends the operation of the detention order. The imposition of any or all the restrictions and conditions H found in s. 6(3)(a) to (j) does not mean that there is now a restriction order in place of the detention order. That is why in the event the suspension order is revoked, the detention order comes into operation. When it does, it does not replace a restriction order as there is none to begin with. The appellant was always detained under a detention order and not a restriction order.

I

[14] Thus, the learned judge was clearly in error when His Lordship held that the writ of *habeas corpus* was not available to the appellant. A

[15] In any event, the placement of the appellant with restrictions imposed under s. 7(1) or even if there was a restriction order issued under s. 6(3) in the first place instead of a detention order, does not disentitle the appellant to a writ of *habeas corpus.* This remedy remains available at all times. The guiding principles on the exercise of judicial powers of intervention when faced with complaints of violations of fundamental liberties under the Federal Constitution through the issue of writs of *habeas corpus* have since been further developed and clarified from the cases relied on by the High Court. B C

[16] Section 365 is nestled in Chapter XXXVI of the CPC. That chapter contains provisions dealing with directions of the nature of a *habeas corpus*. Section 365 reads as follows:

> 365. The High Court may whenever it thinks fit direct: D
>
> (1) that any person who:
>
> (a) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia, E
>
> be set at liberty;
>
> (2) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law. F

[17] The power to issue a writ of *habeas corpus* is actually part of the additional powers of the High Court for the enforcement of rights in Part II of the Federal Constitution, especially the rights enshrined in art. 5(2). These additional powers which are provided in s. 25(2) of the Courts of Judicature Act 1964 (Act 91) are set out in para. 1 of the Schedule of Act 91: G

> **Additional Powers Of High Court**
>
> Prerogative writs
>
> 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus, mandamus,* prohibition*, quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. H

[18] These additional powers are invoked in relation to the rights in Part II of the Federal Constitution, the provisions of which must be given a generous and liberal interpretation so that the rights, safeguards and I

protection afforded under the Federal Constitution, in this case, art. 5, do not become mere platitudes. There is a plethora of authorities in this respect; see for instance *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465; [2021] 2 MLJ 323 @ [25]; *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 @ [50]; *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29; [2021] 1 MLJ 601 @ [43] and *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581; [2021] 3 MLJ 759.

[19] In *Zaidi Kanapiah*, the Chief Justice said:

> [134] It is a settled principle of constitutional construction that constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively (see *Lee Kwan Woh v. Public Prosecutor* [2009] 5 MLJ 301 at para 13).

[20] Although the exercise of these additional powers must be in accordance with any written law or rules of court relating to the same, such laws being the CPC in this case, that purpose and intent for the existence of these additional powers must always weigh in the mind of any adjudicating body. These powers are enacted in order to protect and enforce the rights in Part II of the Federal Constitution; and an application for *habeas corpus* is an invocation for close and careful scrutiny by the courts.

[21] Courts must therefore refrain from taking a narrow view as was adopted in the earlier line of decisions of *Sejahratul Dursina v. Kerajaan Malaysia & Ors* (*supra*); *Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors* [1985] 1 CLJ 229; [1985] CLJ (Rep) 59, and *Sureshwaran V Rajoo lwn. Ketua Polis Negara & Yang Lain* (*supra*). Thus, the narrow construct and requirement for physical detention before the remedy of *habeas corpus* is available is no longer good law.

[22] This court in *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177 had reminded that "it is legally incorrect to state that the jurisdiction of the High Court to issue a writ of *habeas corpus* stems from the fact of detention or the continued physical custody of the person. To maintain that a writ of *habeas corpus* only issues if continued physical custody is present, and that such continued physical custody can only exist where there is current order of detention in existence is, with great respect, a flawed understanding of the law relating to unlawful detention and release, of the law of *habeas corpus.* The correct legal position is that the actual physical custody of the detainee under a subsisting detention order only, is not a pre-condition to the grant of the remedy of release under art. 5(2) of the FC. It is however generally necessary that the detained seeking release is in detention at the time when the application for release or *habeas corpus* is sought *vide* an application to the High Court."

[23] At paras. [81] to [84], this court further reasoned that a writ of *habeas corpus* is not predicated upon the fact of continuing physical custody under a subsisting detention order or any other form of detention because it is the legality and validity of the detention which is under review, not the matter of physical detention. Article 5(2) of the Federal Constitution must be "given full and substantive effect" and the remedy remains available even if the detainee has since been discharged. At para. [87], the Federal Court also reasoned that a full and proper construction of art. 5(2) requires the whole or entire series of transactions, detentions or orders to be scrutinised. In this case, it is obvious that the suspension order cannot stand discrete from the detention order, it is dependent on the detention order.

[24] Despite being alert to this recent decision of *Lei Meng*, the learned judge chose to follow instead the earlier decisions in *Sejahratul Dursina v. Kerajaan Malaysia & Ors* (*supra*); *Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors* (*supra*), and *Sureshwaran V Rajoo lwn. Ketua Polis Negara & Yang Lain* (*supra*). This is apparent from para. [26] where His Lordship reasoned that because the appellant was "not under imprisonment or physically detained in any detention centre; was not physically detained … is free to move about within the said district", and "applying the principles enunciated by the appellate courts in *Sejahratul Dursina*, *Cheow Siong Chin* and *Sureshwaran* above to the facts of the present case, a suspension of detention order which have the effect of a restricted residence order does not constitute detention of such a nature as to attract the application of a writ of *habeas corpus* and does not fall within the ambit of s. 365 CPC".

[25] This is clearly wrong. Further, in view of the principle of *stare decisis* especially when the Federal Court in *Lei Meng* had categorically held that the legal reasoning in these decisions are "flawed and ought not to be followed" – see para. [131], the decision of the High Court cannot be sustained.

[26] This principle of *stare decisis* is of paramount importance in our jurisprudence; otherwise the confidence and integrity of the administration of justice will be severely undermined. This was warned by the Chief Justice in *Zaidi Kanapiah* (*supra*) at para. [36] as well as the Federal Court decision in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149:

> [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a Court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this Court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this Court is the highest Court in the country. The

doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision making formed by case-law. Precedents not only have persuasive authority but also must be followed when similar circumstance arise. Any principle announced by a higher Court must be followed in later cases. In short, the Courts are bound within prescribed limits by prior decisions of superior Courts. Judges are also obliged to obey the set-up precedent established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, *ie*, to stand by the decided. In practice, this means that inferior Courts are bound to apply the legal principles set down by superior Courts in earlier cases. This provides consistency and predictability in the law.

[27] For these reasons, the decision of the High Court must be set aside.

[28] Generally, the proper consequential order would be to remit the application to the High Court for consideration on the merits of the application. However, the learned SFC has conceded that the present detention order suffers from the serious deficit which renders the detention unlawful, null and void as determined in *Selva Vinayagam* (*supra*) and *Asmira Misman v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2022] 1 LNS 2359.

[29] There are no specifications of the presence of a substantial body of persons, be it in the detention order or the grounds of detention, as is required under the terms of art. 149 of the Federal Constitution under which Act 316 was enacted. The stark absence of this requisite renders the detention of the appellant invalid.

[30] We record our appreciation to the learned SFC for that concession.

[31] In such circumstances, it would serve no useful purpose to then remit the case for hearing on the merits. In order to do substantial justice, we accept the concession of the learned SFC and we order that a writ of *habeas corpus* to be issued forthwith.